STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 22, 2012
v	No. 303107 Wayne Circuit Court
ALPHA CHRISTOPHER SMITH, Defendant-Appellant.	LC No. 10-007259-FC

Before: RONAYNE KRAUSE, P.J., and SAAD and BORRELLO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 4½ to 10 years' imprisonment for the assault with intent to do great bodily harm less than murder conviction, and two years' imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

On June 27, 2010, in the early afternoon, Shonara Harris, the victim and defendant had a physical confrontation that resulted in defendant shooting the victim three times. Harris and defendant met in grade school and had been very good friends for about 11 years, however, they were involved in an ongoing disagreement about clothes defendant borrowed from Harris and had not returned.

On appeal, defendant argues that there was insufficient evidence to prove, beyond a reasonable doubt, that he did not act in self-defense. We disagree.

Sufficiency of the evidence questions are reviewed de novo, in a light most favorable to the prosecution. *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010). This Court determines whether a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt. *People v Railer*, 288 Mich App 213, 217; 792 NW2d 776 (2010). Circumstantial evidence and reasonable inferences may be used to prove the elements of the crime. *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010).

Defendant contends that the prosecution failed to present any reliable and credible evidence proving that defendant did not act in self-defense. We disagree.

The Self–Defense Act provides:

> [A]n individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if . . . [t]he individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual. [MCL 780.972(1)(a); *People v Orlewicz*, 293 Mich App 96; 809 NW2d 194 (2011).]

Once a defendant satisfies the initial burden of producing some evidence to establish a prima facie case of self-defense, the prosecution bears the burden of proving, beyond a reasonable doubt, the defendant did not act in self-defense. *People v Dupree*, 486 Mich 693, 709-710; 788 NW2d 399 (2010). The prosecution presented two witnesses that testified that defendant did not act in self-defense, but rather, was the aggressor. Harris testified that he did not bring a weapon to defendant's house, that he did not act like he was drawing a weapon, that defendant was the first one to throw a punch during the fist fight and that he believed the fight was over after he allowed defendant to get off the ground. Harris did not believe that the fight was serious and that before defendant went in the house, a place of safety for defendant, defendant mentioned a gun. Harris stated that after the first shot, defendant came closer while Harris was on the ground and took another shot at him. Defendant then aimed the gun at Harris's head, and said, "I've got to kill you," and mentioned that Harris would tell the police if he did not kill him. While Harris was running away, defendant shot at him yet again.

Harris's girlfriend, Tarah Buchanan, confirmed that Harris did not have a weapon. Even though Buchanan did not confirm that Harris fell after the first shot, and could not confirm defendant held a gun to Harris's head, this is only relevant to defendant's intent to murder, not whether defendant acted in self-defense. The prosecution also presented a reluctant witness, defendant's aunt, Patricia Washington, who testified that defendant went inside the house and came back outside with a gun, and defendant looked angry and agitated when he was in the house. Given these facts, defendant could not have honestly and reasonably believed that Harris was attacking him with deadly force.

Harris's and Buchanan's similar description of the incident does not necessarily indicate that they rehearsed their testimony. Defense counsel pointed out the potential collusion to the jury. Credibility of the witnesses is a jury question. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). A rational jury could have decided that, despite some inconsistencies, the witnesses' testimony was credible, and showed that defendant did not honestly and reasonably believe that Harris posed an imminent danger or threat of serious bodily harm to defendant.

In defendant's supplemental brief, he first argues that the prosecution knowingly allowed Buchanan to give false testimony. We disagree.

This Court reviews unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). "[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). A defendant's fair trial is endangered "when the prosecutor interjects issues broader than the guilt or innocence of the accused." *Id*.

> [A] conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment. If a conviction is obtained through the knowing use of perjured testimony, it "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of jury." [*People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009), quoting *United States v Agurs*, 427 US 97, 103; 96 S Ct 2392; 49 L Ed 2d 342 (1976).]

A "prosecutor may not knowingly use false testimony to obtain a conviction" and has a duty to correct any false testimony. *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). This includes the duty to correct perjured testimony that relates to a witness's credibility. *Id.* at 277.

The prosecutor did not knowingly use false testimony to convict defendant. It is not clear that Buchanan gave false testimony. Perjury requires a material, willful false statement. *In re Contempt of Henry*, 282 Mich App 656, 677-678; 765 NW2d 44 (2009). Buchanan told the police that Harris went over to defendant's house to fight defendant. However, Buchanan testified that Harris went over to defendant's house to get his clothes back. There are many explanations for these inconsistent statements. She may have given a false statement to the police, her memory might have changed, she may have been mistaken about what Harris actually said, or, as she testified, she may have meant verbally fight when she spoke to the police. Therefore, Buchanan's inconsistent statements are not necessarily perjury.

Additionally, even if Buchanan gave false testimony, there is not a "reasonable likelihood that the false testimony could have affected the judgment of the jury." *Aceval*, 282 Mich App at 389. Buchanan's alleged false testimony was not material to the issue of self-defense. Defendant used deadly force against Harris. To be acting in self-defense, defendant must have honestly and reasonably believed that Harris was threatening deadly force. *Dupree*, 486 Mich at 707. Therefore, Buchanan's inconsistent testimony about the use of *nondeadly force* was not material. Her testimony was consistent and uncontested regarding the fact that Harris did not have a weapon. Furthermore, defense counsel impeached Buchanan on this issue, and therefore, the jury's verdict takes the potential false testimony into account.

Second, defendant argues in his supplemental brief, that his defense counsel was ineffective because he failed to move for a directed verdict or object to Buchanan's and Harris's testimony. We disagree.

Ineffective assistance of counsel claims are mixed questions of law and fact. *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). This Court reviews a trial court's findings of fact, if any, for clear error, and reviews the ultimate constitutional issue arising from the ineffective assistance of counsel claim de novo. *Id.*

"To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness, and but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *Swain*, 288 Mich App at 643. "Effective assistance of counsel is presumed, and the

defendant bears a heavy burden to prove otherwise." *Id*. Counsel is not required to argue a meritless position or raise a futile objection. *Ericksen*, 288 Mich App at 201.

Defense counsel's failure to move for a directed verdict or object to Buchanan's and Harris's testimony, does not fall below an objectively reasonable standard and is not outcome-determinative. Defendant confuses perjury with inconsistent statements and witness credibility. As discussed previously, Buchanan's inconsistent statements are not necessarily perjury. Further, defense counsel impeached Buchanan's testimony with her statement to the police that Harris went over to defendant's house to fight him. Impeachment is a legitimate and effective way to question a witness's credibility. *People v Blackston*, 481 Mich 451, 487; 751 NW2d 408 (2008). Along those same lines, defense counsel questioned Buchanan about whether Harris and Buchanan had rehearsed their testimony. Therefore, it was defense counsel's trial strategy to question the credibility of Harris's and Buchanan's testimony, rather than to object to it.

Ultimately, even if defendant objected to the testimony or had moved for a directed verdict, neither the objection nor the motion would have been successful. An objection on the basis of Buchanan's and Harris's credibility would not have been successful because "it is the province of the jury to… assess the credibility of witnesses." *Lemmon*, 456 Mich at 637. A motion for a directed verdict would not have been successful because, in a motion for directed verdict, "'it is not permissible for a trial court to determine the credibility of witnesses in deciding a motion for directed verdict of acquittal, no matter how inconsistent or vague that testimony might be.'" *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001), quoting *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). Therefore, defense counsel was not ineffective.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Henry William Saad
/s/ Stephen L. Borrello